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## When Cyberspace Meets Main Street: A Primer for Internet Business Modeling in an Evolving Legal Environment

Christopher Paul Boam

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# **When Cyberspace Meets Main Street: A Primer for Internet Business Modeling in an Evolving Legal Environment**

*by*  
 CHRISTOPHER PAUL BOAM\*

I. The "Great Equalizer" .....	100
II. The Role of Creative Thinking in Developing Your Internet Model .....	101
III. Delivering the Product and Methods of Payment: Unique Internet Innovations .....	106
IV. Technical Impediments and All-Important Security Issues .....	108
V. Unique Models Create Unique Legal and Technical Concerns .....	111
A. The "World" of Internet Law .....	111
B. "Unlimited" Access to Information Means "Big" Liability for Content .....	115
C. Identifying the Customer and the Right to Privacy .....	118
D. Electronic Contracting .....	122
E. Regulatory Oversight of the Internet? .....	123
VI. Conclusion .....	124

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"Save the Shop Around the Corner, and you save your soul."<sup>1</sup>

## Introduction

Together with most of the professional world, I admit to increasingly making discount purchases on the World Wide Web via the likes of "Amazon.com" and "Suncoast.com." To borrow a recent characterization from Hollywood, I readily acknowledge that the Internet consumer will, for better or worse, change the "shop around the corner." However, unlike the impact of a wholesale chain on the bottom line of the "mom and pop" shop, the advent of electronic commerce ("e-commerce") can have the capacity to be the great equalizer. Whether you are trying to start a new business, reinvigorate an old one, or maintain existing market prowess, the impact of e-commerce on traditional notions of sales and consumer purchasing will require you to think differently. Indeed, if you decide to enter the fray of e-commerce and have ever considered "thinking outside the box," the time is now.

Although traditional business models and concepts remain applicable in the Internet world, they arguably require substantial updating and revision. The concept of a business model begins with a plan. A plan for making money, and then for sustaining that income. The model for a traditional business includes the following considerations:<sup>2</sup> 1) customers/markets (Who are my customers and competitors?); 2) products/services (What should I be selling?); 3) positioning (Why would customers choose *my* products/services over those of my competitors?)<sup>3</sup> and 4) payment/distribution systems (How can I sell and timely deliver my products/services?).

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1. *You've Got Mail* (Warner Bros. Pictures, 1998) (Kathleen Kelly's (Meg Ryan) slogan in a media campaign to save her tiny children's bookstore from bankruptcy in the face of wholesale chain store competition).

2. See Gail L. Grant, *Business Models for the Internet and New Media*, 545 PLI/PAT. 39, 45 (P.L.I. Jan., 1999) (source for modeling points 1, 2 and 4).

3. See Gary C. Boam, *The Role of Product "Positioning" in Business Modeling* (1998) (unpublished lecture on file with author) (describing "positioning" as: 1) developing a clear definition of your target market, and then 2) developing a marketing plan to target the market, emphasizing product efficiencies and superiority of customer service).

To develop a basic business concept for a chosen medium, it is generally recommended that you begin with the most valuable aspects of your business medium. The three fundamental characteristics of the Internet that support its seemingly limitless use as a tool for business — that it is borderless, faceless, and paperless — also present significant challenges. The same technology which allows the smallest of entrepreneurs to enter millions of households throughout the world also subjects them to innumerable conflicting foreign laws and jurisdictions and magnifies the legal impact of any content errors. The ability to enter the households of millions of unknown persons also poses difficult challenges of identification, privacy, and security. To magnify these concerns, once you enter these households, the opportunity to enter into and conclude thousands of transactions without face-to-face contact or signed paper contracts raises additional issues of transaction validation and authentication. The collective impact of these peculiar characteristics of the Internet on traditional notions of doing business offers great opportunities, but it also creates challenging legal issues.

The Internet's effect on traditional business models is due in part to its rapid growth as a medium and the potential of that growth for business. For a perspective on the Internet's business potential, consider the following:<sup>4</sup>

- 171 million people have Internet access — over half are in the U.S. and Canada.
- Nearly one-third of U.S. households are regular Internet users.
- In 1998, the "Internet economy" generated over \$300 billion in total revenue in the U.S. alone.
- "Commercial activity" on the Internet is expected to reach \$100 billion in revenues in 1999.
- North American retailers generated \$14.9 billion in

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4. Internet commerce statistics were derived from the following three articles: *State of Online Retailing, Summary of Key Findings*, Shop.Org Research (Jul. 1999) <<http://www.shop.org/research/summary.htm>>; *Shop.org Releases New Market Figures in a Study by The Boston Consulting Group*, Shop.Org Research (Jul. 19, 1999) <<http://www.shop.org/nr/99/071999.html>>; Masterson, Michele, *Shop.org Suggestions for Successful E-Tailing*, *E-Commerce Guide* (Jul., 1999) <[http://ecommerce.internet.com/solutions/e-consultant/article/0,1281,9571\\_165101,00.html](http://ecommerce.internet.com/solutions/e-consultant/article/0,1281,9571_165101,00.html)>.

online sales in 1998 and expect at least \$36 billion in 1999 (a 145% increase).

- Internet traffic continues to increase — visitors to retail sites rose 300% in 1998, and online retail orders grew by 200%.

Of course, these kinds of data change from month to month, but updates of both actual and projected data consistently show ever increasing commercial activity. For instance, it was recently revealed that more than 40% of new-car shoppers used the Internet for research during the first quarter of 1999.<sup>5</sup>

## I

### The "Great Equalizer"

With regard to "markets and customers," who you consider to be your customers and prospects can change radically in the virtual environment. Because the medium is global and electronic, it is just as easy to click on a link that connects you to a computer down the hall as on one connecting you to a supplier thousands of miles away. This opens up new customer and market possibilities for companies both large and small. Whereas a small company can now contemplate selling to nationwide and foreign markets, large companies now have a new, easier way to reach customers in distant previously under-developed markets and to improve service to existing customers. It is primarily this "equality of access" to new markets and customers that enables the Internet to render traditional notions of the relevant "geographic" market and customer ineffective, and thus, serve as a great equalizer.

Although a store's geographic "location" may no longer be critical for retail sales, the "electronic location" of its website and the ability of potential customers to find it raise the same kinds of concerns. However, an electronic "location" in an Internet context is more of a marketing issue than the concern for a *physical placement* of a business. Traditional notions of a "catchy" business name can be incorporated into an attractive domain name for your site, for instance. In

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5. See Ohlson, Kathleen, *40 Percent of New-Car Shoppers Use Net for Research*, CNN Interactive (Aug. 25, 1999) <<http://www.cnn.com/tech/computing/9908/25/carshop.idg>>.

addition, inclusion of key words, often called “meta links,” emphasizing what it is that you are selling or providing — i.e., “books,” “rare” and “used” if you are a bookseller — will ensure that your site is found by potential customers who enter those search terms into their Web browser. It also never hurts to have others, i.e., bookselling associations and other sellers, provide a link to your site at the end of their own: “If you can’t find it here, why don’t you try Yourstore.com?”.

Once you have developed an e-commerce model, you must consider several traditional business modeling issues before implementing your concept. To assess your e-commerce readiness, consider the following factors: 1) management’s commitment to the venture; 2) the competitive environment; 3) the proposed venture’s effect on existing distribution, 4) content readiness (the applicability of an existing product to Internet sales), and 5) system readiness (the technical ability to handle electronic traffic and fulfill orders). These factors may not preclude the new Internet venture, but they may alter components of your Internet-based product, payment and distribution system to fit your business capabilities and ensure the necessary organizational support to implement your concept.

## II

### **The Role of Creative Thinking in Developing Your Internet Model**

Unfortunately, *new* products and services represent the greatest but most underutilized opportunity to stray from traditional models in developing an Internet business. Too often, entrepreneurs and business managers seek to fit the products and services they have always provided into an Internet model, and thus, do not exercise the medium’s full potential. This prospect for “stagnant utilization” of Web resources is perhaps best illustrated in a concern related to me recently by a colleague: “My fear about the Web is that the major television networks will eventually own it and treat it simply like another broadcast medium — it will be just another set of channels.” This is not to say that traditional models cannot be applied in an Internet environment. The likes of BarnesandNoble.com have shown us that the “tried and true” methods of business modeling can work, with tremendous profit potential.

Indeed, apart from functioning as an additional sales outlet with low overhead and transactional costs, the Internet can offer the existing business and its traditional products innumerable ways to improve operations. To describe just a few familiar applications: a website is a common source of investor information; it can efficiently address customer service needs with content such as instructions and "help" information; it can supplement your in-store product lines with complementary products, online offers and discounts; and it can decrease mass mailing costs through "online cataloguing." The key, however, as we will discuss in greater detail, is to recognize that with its innovative benefits, the Internet's borderless, paperless and faceless environment presents new legal challenges even when implementing the "tried and true" on the Web.

While companies like Amazon.com confirm that traditional product Internet retailing can be successful and efficient, Amazon.com and others also have exploited Internet opportunities to blur the line between products and services. Internet companies that provide access to information or varied sources of information or services are called "portals." In the most basic sense, these companies "sell the rights to put a product or service before the portal's users."<sup>6</sup> For example, NewsEdge and Cnet aggregate news and other information from other sources and make them available to consumers.<sup>7</sup> However, whereas Cnet provides access to the information, NewsEdge sells audience access to the information, subscriptions to receive certain information automatically *and* a pay-per-view option.<sup>8</sup> For document access, there is no comparable medium that approaches the Internet's efficiency at providing pay-per-view *and* other traditional information products/services.<sup>9</sup> Other companies such as Yahoo! and HotBot are also taking advantage of opportunities to increase portal utility to consumers beyond

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6. See Grant, *supra* note 2, at 50. Yahoo recently moved to establish access to Internet portal sites through mobile phones, dubbing the strategy "Yahoo Everywhere." See Rohde, Laura, *Yahoo Unveils Wireless Service*, *CNN Interactive* (Aug. 25, 1999) <<http://www.cnn.com/tech/computing/9908/13/yahooeverywhere.idg>>.

7. See Grant, *supra* note 2, at 48-49.

8. See *id.* at 49.

9. See *id.*

basic information.

In taking a traditional business concept and reworking it to take advantage of the Internet as a commercial medium, it is helpful to begin by asking the following questions:

- Who are my customers?
- What do they want from me?
- How do they want to get it?
- What do they *really* want?
- How can I get it to them?
- How can I retain them as customers?

As an existing business or entrepreneur with a traditional concept, you must hone your emphasis on the underlying notion of what it is that your customers are *really* looking for (e.g., information, generally, as opposed to simply a subscription to the AP newswire). Then, re-think how you might be able to provide the product or serve the need (e.g., give them access-on-demand to a newswire tailored to their interest at hand — Bloomberg for business news, for example — and the option of hearing real-time audio reports on breaking news from CNN). This exercise will take your business model beyond those simple efficiencies that the Internet can afford even in a traditional business environment: improving service, reducing costs, increasing market share, and opening new markets. In addition, you will be taking advantage of those markets and product/service combination that will make the “positioning” of your *Internet* business vitally different from that which could be achieved with a traditional model. For instance, consider Monster.com, which is taking advantage of the Web’s capabilities for two-way communication by linking job seekers with human resource recruiters rather than simply posting resumes on a site.<sup>10</sup>

There are four emerging ways that companies can change their product mix when selling over the Internet, and each, in turn, can involve lesser initial investment in making the product available. Each new business method uses the flexibility of the Internet to address different inefficiencies in traditional models and provide different opportunities:<sup>11</sup>

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10. See Jacqueline Emigh, *E-Commerce Strategies*, COMPUTERWORLD, Aug. 16, 1999, at 53.

11. See DAVID HENRY ET AL., U.S. DEP’T OF COMMERCE ECON. AND



- *New Products*: The sale of products not sold elsewhere or in a different form than the traditional product (for example, MP3 technology, discussed below).
- *Auctions*: Online buyers can find otherwise unavailable products without accruing real-world search and travel costs, creating an efficient after-market and reducing seller surplus and losses due to unsold product.
- *Aggregators*: By offering new products or “pooling” existing products to create a searchable one-stop “shopping mall” with “retail” prices, efficiencies are improved and purchasing communities are created.
- *Exchanges*: Such sites can simply direct a buyer to a product sold by another firm and receive a commission for doing so, or they can be complex enough as to provide vetted players with a trading venue defined by clear rules, industry-wide pricing, and open market information, all at a fraction of real-world cost.

Obviously, the greater the involvement of the company in actually producing and delivering the end-product, the greater the required investment and cost. Apart from adapting your chosen service or product to one or more appropriate sale and distribution methodologies, you should also remember to categorize the buyers in your chosen market to determine which of the above four methods is most suitable. Will you be: a business-to-consumer seller, 2) a provider of a consumer-to-consumer or business-to-consumer platform (traditional auctions); or 3) a business-to-business seller?<sup>12</sup>

Once a business model is established, a plan for customer retention is of paramount importance in this competitive new environment. Lycos, Inc. divides e-customer retention considerations into three categories: “content, commerce and communities.”<sup>13</sup> Most traditional businesses operating on the Internet, Lycos points out, have the most

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STATISTICS ADMIN., THE EMERGING DIGITAL ECONOMY II, II (1999) [hereinafter EMERGING DIGITAL ECONOMY], (citing Varda Lief, *Anatomy of New Market Models*, Forrester Research (visited Feb. 1999) <<http://www.forrester.com>>.)

12. See Emigh, *supra* note 10, at 53.

13. *Id.*

difficult time with the concept of community building.<sup>14</sup> E-commerce involves sales of products and services in an environment that must be made distinct in order to make a site “sticky” — offering content and services to keep a visitor coming back to the site, staying for longer periods of time and referring friends to the site.<sup>15</sup> Although no site is too small to develop communities, the Internet version of the corner store where “everybody” gathers, sites that have visitors of two hundred thousand (200,000) or less per month, will likely find message boards to be a worthier investment than chat rooms.<sup>16</sup> Two hundred thousand (200,000) visitors may sound like a lot, but in the high-speed world of the Internet, users of your well-intentioned chat rooms could find that they are engaged in decidedly non-communal conversations with themselves.

Applying innovative thinking in Internet product delivery, Jeff Bezos employed a model in developing Amazon.com that has been particularly successful in creating communities.<sup>17</sup> In typical “brick and mortar” bookstores, customers can browse the stacks, order a latte and perhaps even mingle with like-minded customers.<sup>18</sup> Bezos has prided Amazon’s capacity to create the same type of interaction through information — ranking books by sales and also identifying other purchases made by anonymous buyers of the book the consumer chooses.<sup>19</sup> By contrast, in the Internet auction arena, eBay’s founder Meg Whitman has emphasized direct inter-customer contact by encouraging feedback from customers and establishing extensive chat boards that enable users to share purchasing tips and gossip.<sup>20</sup>

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14. See *id.*

15. See Joseph Szadkowski, *PeopleLink Increases Web Traffic by Making Pages more Sticky*, WASH. TIMES, Aug. 16, 1999, at D6.

16. See *id.*

17. Although enjoying steady customer retention, Amazon.com has yet to turn a profit and recently lost the head of its logistics operations amid nagging distribution problems that have slowed the company’s growth. See *Online Retailer’s Head of Logistics Leaves Amidst Warehouse Struggles*, CNN Interactive, Sept. 3, 1999, <cnfn.com/1999/09/03/technology/amazon>.

18. See Steven Levy, *Wired for the Bottom Line*, NEWSWEEK, Sept. 20, 1999.

19. See *id.*

20. See *id.*

### III

#### **Delivering the Product and Methods of Payment: Unique Internet Innovations**

As described above, the Internet provides more options for recouping costs than those associated with traditional methods. For instance, an Internet-based company can choose to charge for customer access, percentage sales or subscriptions, and/or on a fee-by-transaction basis.<sup>21</sup> Internet auctioning, one of the hottest trends in emerging business modeling, represents two of these potentials for payment and delivery at once. For instance, eBay and "new entrant" Sotheby's make money from the seller by requiring a percentage of the sale.<sup>22</sup> By contrast, Onsale and uBid operate more like traditional resellers by collecting bids on auctioned items.<sup>23</sup> Further indicating auction popularity, both Amazon.com and its principal online competitor BarnesandNoble.com, each known for traditional retail product delivery/payment schemes, have also recently added auction-style options. Each retailer makes its site available for customers to post out-of-print or unavailable book titles and movies for sale, taking a percentage of each sale as a fee.

Most recently, the case has also been made for no-charge business models. Such Internet companies will temporarily provide a service for free in order to develop a customer base. The no-charge model, however, will only make sense if the company can do two things right.<sup>24</sup> First, it needs to build huge pools of users without investing much up-front.<sup>25</sup> Second, the company must successfully convert those users into paying customer through advertising placement on the website or by leading the users into e-commerce transactions.<sup>26</sup> Yahoo!, a successful portal utilizing this

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21. See EMERGING DIGITAL ECONOMY, *supra* note 11, at 11-12. Such billing methodologies can be implemented effectively in both business-to-business and business-to-individual sales. See *id.*

22. See Grant, *supra* note 2, at 51.

23. See *id.*

24. See George Anders, *Free for All: Eager to Boost Traffic, More Internet Firms Give Away Services*, WALL ST. J., July 28, 1999, at A1.

25. See *id.*

26. See *id.*

model, does not charge for its Internet directory service, yet the company, which garnered second-quarter revenues of \$115.2 million in 1999, has attracted enough users and advertising dollars to command a \$29.7 billion stock-market valuation.<sup>27</sup> Portals like Yahoo! may be in the best position to make this model profitable in the short-term as the level of Internet user traffic at these sites makes advertising extremely lucrative.<sup>28</sup> However, even "successful" e-businesses like Blue Mountain Arts, Inc., which attracts tens of millions of visitors each month to its free-of-charge Internet greeting card business, admits that "if we're losing money, we're losing a lot less than other people."<sup>29</sup> Thus, in the short-term, this type of model may not be for the faint of heart (or of wallet) despite its popularity.

But perhaps the most innovative delivery and payment methodologies available are represented by MP3 and digital currency. MP3 ("Motion Picture Experts Group, Audio Layer 3") technology enables music files to be stored, delivered over the Internet and saved to a computer using very little memory but producing impeccable sound.<sup>30</sup> Music can be purchased and played without the consumer ever visiting a store or handling a CD.<sup>31</sup> Most recently, in the first case of its kind, the U.S. Court of Appeals for the Ninth Circuit held in *Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys., Inc.* that a hand-held device using MP3 technology to receive, store and replay a digital audio file was not a "digital music recording device" within the meaning of the Audio Home Recording Act.<sup>32</sup> Thus, the court declined to enjoin

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27. See *id.*

28. However, as more and more second-tier independent portals such as MindSpring begin competing with "majors" such as Yahoo! and Netscape, the prospects for survival with a free-access model begin to dwindle with the available user base. See Dean Foust and David Rocks, *In a Squeeze at MindSpring*, BUS. WK., Sept. 20, 1999, at 139.

29. See Anders, *supra* note 24, at A1.

30. See MP3.com, *MP3 for Beginners*, <<http://www.mp3.com/help.mp3/help/rookie>>.

31. See L.A. Lorek, *A Note of Interest: MP3 Technology Changes Music on Web*, SUN-SENTINEL (Fort Lauderdale), Feb. 28, 1999, at F4. For a comprehensive discussion of MP3 and its legal implications, see Jennifer E. Markiewicz, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMMLAW CONCEPTUS 423 (Summer, 1999).

32. See 180 F.3d 1072 (9th Cir. 1999).

manufacture and distribution of the device as illegal, finding it could not be a means to infringe copyrights within the meaning of the Act.<sup>33</sup> Apart from possible copyright violations, when difficulties in storage capacity and transmission speed are overcome, the impact of MP3-like technology on the delivery of motion pictures will likely be astounding.

In addition, whereas MP3 represents a novel method of product delivery, what is frequently referred to as "digital currency" is revamping traditional payment notions. The most prolific of available digital payment options is a stored value system, similar in function to an ATM or check-card. This system requires an Internet purchaser to load value into "wallet" software before making a payment at a website.<sup>34</sup> Money is transferred or "loaded" into the wallet using either a credit card, an ACH ("automated clearing house"), or an ATM network, and transferred funds are held in a bank account maintained by the service provider on the purchaser's behalf.<sup>35</sup> To make a payment, the purchaser uses the wallet to send encrypted payment information to the merchant, who then passes it to the service provider for settlement. The service provider debits the purchaser's account maintained by the provider and credits a similar account maintained by the merchant. Many e-commerce participants, including American Express, CyberCash, and America Online, have recently adopted the Electronic Commerce Modeling Language ("ECML") for digital wallets, decreasing possibilities for fraud and increasing interoperability of payment systems.<sup>36</sup>

#### IV

#### **Technical Impediments and All-Important Security Issues**

The technical nature of the medium itself poses one of the most potentially difficult challenges to its utilization.

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33. See *id.* at 1081.

34. See Robert F. Stankey, *Internet Payment Systems: Legal Issues Facing Businesses, Consumers and Payment Service Providers*, 6 COMM.LAW CONSP. 11, 18 (Winter, 1998).

35. See *id.*

36. See Michele Masterson, *ECML Offers Seamless E-Commerce Transactions*, (June 14, 1999) <[http://ecommerce.internet.com/opinions/article/0,1281,3551\\_137791,00.html](http://ecommerce.internet.com/opinions/article/0,1281,3551_137791,00.html)>.

Given that e-commerce is dependent on computer-based applications, any venture can become mired in issues of content portability, transmission speed and the all-important element of transactional security. With the advancement of technology and increase in Web traffic has come the desire to place more visually appealing content on e-commerce webpages. The slow download times or "content portability" associated with high resolution graphics and complex applications are posing sizeable economic risks to many e-commerce businesses.<sup>37</sup> It is estimated that nearly \$58 million in potential e-commerce sales is lost each month due to webpage loading failures.<sup>38</sup> Even the most innovative business offering the most sought after product can fail in the face of customer download frustration. To make matters worse, a full 70% of online retailers lack operational strategies for cultivating their all-important customer relationships in the face of technical failures.<sup>39</sup> When assessing the content portability of your site, remember that the capability of your equipment to house your e-commerce site may not be matched by the transmission bandwidth and computer memory capacity of your customer's equipment. Thus, consider the computer savvy of your potential customers in designing the content of your site. Content portability should reach a "happy medium," recognizing that the standard webpage download time is about 8 seconds.<sup>40</sup>

The key to security in any business transaction where the customer is unseen is "identifying" the customer, and the same is true for the Internet. The importance of this issue cannot be overemphasized. Most often, Internet-based businesses will require first-time customers to enter basic information about themselves, at the very least: a username, a password (to use the system with your username in the future) and an e-mail address. Once the customer decides to perform a transaction on the site, the business typically requests additional information, including name, address, phone number and method of payment. However, with the

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37. See Michael Pastore, *Slow Sites Costing E-Commerce Dollars*, (June 30, 1999) <[http://ecommerce.internet.com/opinions/print/0,1282,3551\\_149011,00.html](http://ecommerce.internet.com/opinions/print/0,1282,3551_149011,00.html)>.

38. See *id.*

39. See *id.*

40. See *id.*

privilege of asking consumers for this information comes the obligation to make the information "safe" or secure from unwanted use or intrusion. Internet business security issues are commonly divided among hardware, or physical security concerns, and privacy concerns, which will be discussed later.

Among the hardware-related security issues to consider are: 1) securing your Web server and business data, 2) securing transactional information (between the server and consumer), and in some cases, 3) securing the *consumer's* computer or network. Security risks to e-commerce run the gamut from "eavesdropping" and "packet sniffing" of transactional data to cracking passwords and exploitation of system flaws by hackers. Most security measures begin with the installment and maintenance of computer "firewalls" to protect the business's internal system *and* data and modes of encryption to disguise and protect information during an e-commerce transaction.

As a testament to how security can be breached despite the best and brightest of technological efforts, consider the security breach of Hotmail, Microsoft's Web-based e-mail service, in late August, 1999. The breach occurred when several non-public Web addresses, "Hotmail holes," were discovered that allowed access to e-mail accounts without use of a password.<sup>41</sup> During the several days that it took Microsoft to close the holes, unauthorized users could read and forward member's old messages, read new messages and send e-mail under the name of the user without use of a password.<sup>42</sup> The Hotmail example serves to reinforce the notion that just as important as hardware and software concerns is the introduction of supporting policies and practices. Not only should consumers be aware of what security measures *you* have taken, but both company staff and customers should be aware of what steps *they* must take to ensure that security measures are both applied to individual transactions and are effective.

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41. See Robin Lloyd, *Hotmail Hole Still Wide Open*, CNN Interactive, (Aug. 30, 1999) <<http://www.cnn.com/TECH/computing/9908/30/hotmail.04>>.

42. See *id.*

## V

### Unique Models Create Unique Legal and Technical Concerns

#### A. The "World" of Internet Law

Because of the Internet's universal reach, a business in "Modeltown," USA is potentially subjecting itself to the uncertain and conflicting laws of countries throughout the world. For the last few years, the Internet has posed unique jurisdictional difficulties for courts around the globe. The reason is easy to deduce; e-commerce orders leap from computer to computer without regard for national borders. The good news is that the United States, through case law and statutes, has developed an approach to evaluating jurisdiction in Internet-based cases which applies the traditional minimum contacts test. The bad news is that, for most other countries, determining proper jurisdiction is anything but a settled issue.

In the final analysis, identifying the potentially applicable foreign laws and their impact on a given Internet venture (a lawyers' dream) would be prohibitively expensive and time-consuming. It also would likely yield little more than the not-so-helpful advice that "you will have increased *exposure* to liability" from e-commerce. The basic starting points are compliance with traditional good business practices (adapted to e-commerce) and operation of your business through a separate business entity so that such exposure is limited to your e-commerce assets. Second, based upon the following jurisdictional principles, you can identify troublesome legal issues and jurisdictions as Internet law develops. This will enable you to respond by adjusting your business practices generally to customers in those jurisdictions or to take steps to exclude them from your e-commerce territory.

To support jurisdiction in the U.S. (or a particular state in the U.S.), the threshold test is whether a defendant has purposefully availed himself of a forum's laws. And in terms of finding purposeful availment, American courts have grouped Internet cases into three categories.<sup>43</sup> First,

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43. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa.1997). See, e.g., *Panavision Int'l v. Toeppen*, 141 F.3d 1316 (9th Cir.



purposeful availment can most easily be established when “a defendant clearly does business over the Internet” with clients from a particular jurisdiction — *e.g.*, the defendant enters into contracts which require the “knowing and repeated transmission of computer files over the Internet” into a jurisdiction.<sup>44</sup> A second category of cases includes those involving interactive websites, “where a user can exchange information with the host computer.”<sup>45</sup> Passive websites fall into a third category. In these cases, a defendant has simply posted information on the web, which is accessible to users in foreign jurisdictions.<sup>46</sup> Jurisdiction is often asserted for activity encompassed by the first category, occasionally for the second and rarely for the third. Whether the exercise of jurisdiction is appropriate depends upon “the level of interactivity and commercial nature of the exchange of information” that occurs on the website.<sup>47</sup> Thus, e-commerce activities frequently fall into the second or, the first category.

However, the unsettled nature of international jurisdiction leaves unanswered the question of when an Internet service provider (“ISP”) in one country may be held liable under the laws of another country. In a notable recent example, a Bavarian court asserted its jurisdiction and convicted the local manager of U.S.-based CompuServe for violating German anti-pornography laws.<sup>48</sup> On June 3, 1998 the Landesgericht (District Court) of Munich handed down a two-year suspended sentence and fined the manager US \$56,200.<sup>49</sup> The *CompuServe* decision posed a dangerous

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1998); *Patriot Sys. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah. 1998); *SF Hotel Co., L.P. v. Energy Invs., Inc.*, 985 F. Supp. 1032 (D. Kan. 1997).

44. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

45. *Id.*

46. *See id.* But see *Archdiocese of St. Louis v. Internet Entertainment Group, Inc.*, 34 F. Supp. 2d 1145 (E.D. Mo. 1999) (where the court exercised jurisdiction over a “passive” web site that specifically targeted information to forum residents).

47. *Zippo Mfg. Co.*, 952 F. Supp. at 1124. *See also* Timothy B. Nagy, *Personal Jurisdiction and Cyberspace: Establishing Precedent in a Borderless Era*, 6 COMM.LAW CONSPECTUS 101, 108-10 (Winter, 1998) (providing a thorough discussion of this concept).

48. *See* Stephan Wilske and Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117, 122 & n.24 (Dec., 1997).

49. *See Marcoberts Solicitors: Shock Decision by German Court against ISP*, M2 PRESSWIRE, June 29, 1998, 1998 available in WL 12977308. The original text of the decision, in German, can be viewed at

precedent for ISPs because it extended liability to the ISP rather than the Internet user who posted the offending material. Even the prosecutor in the case appeared concerned about its implications and, ironically, appealed the conviction.<sup>50</sup> The *CompuServe* appeal remained pending for over a year and a half, but on November 17, 1998, Chief Judge Lazslo Ember announced the German state court's reversal of the decision.<sup>51</sup> Nevertheless, in the interim, the lower court verdict had adversely affected Internet business in Germany. In direct response to the lower court ruling, in July, 1998, the London-based ISP subsidiary of Psinet physically moved its Web servers out of Germany for fear of violating Bavarian law.<sup>52</sup> Such drastic steps, taken in response to an assertion of jurisdiction over Net-based activity, are rare, but they do represent the extent to which judicial action in a forum can panic a developing business.

Perhaps the most troubling recent development involving the Internet and international jurisdiction is a draft European Union ("EU") Directive that many claim could seriously stunt the growth of electronic commerce and lead to a damaging trade dispute with the U.S.<sup>53</sup> If finalized, the legislation would allow disgruntled Internet shoppers to sue e-commerce firms in their own national courts, regardless of whether the company had "actively sought" to sell its product in that country.<sup>54</sup> At the moment, under EU law unhappy e-commerce customers can generally seek redress only in the

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<<http://www.jura.uni-wuerzburg.de/Lst/sieber/somm/somm-urteil.pdf>>. An unofficial English translation is available at <<http://www.cyber-rights.org/isps/somm-dec.htm>>.

50. See *id.*

51. See ASSOCIATED PRESS, *German Court Overturns Internet Porn Conviction*, Nov. 17, 1999, 13:56 EST. As had been long professed by CompuServe lawyers, Judge Ember agreed that the technical ability to *effectively* block content simply did not exist at that time, adding that "more could not have been asked of" Felix Somm. *Id.*

52. See *Psinet Moves Out After German Court Blamed ISP for Porn Distribution*, VNU BUS. NEWSWIRE, July 7, 1998, available in 1998 WL 23800227.

53. See Reuters, *European Law Seen as Grave Threat to E-Commerce*, FOXNews (Sept. 10, 1999) <[http://www.foxnews.com/scitech/wires2/0910/t\\_rt\\_0910\\_16.sml](http://www.foxnews.com/scitech/wires2/0910/t_rt_0910_16.sml)>.

54. See *Amended Proposal for a European Parliament and Council Directive, on Certain Legal Aspects of Electronic Commerce in the Internal Market*, 98-0325, COM (17.08.1999) 427 *final*. The official text can be found at [europa.eu.int/comm/dg15/en/media/eleccomm/com427en.pdf](http://europa.eu.int/comm/dg15/en/media/eleccomm/com427en.pdf).

country where the e-business is based.<sup>55</sup> The European Commission met to hear public comment on the Draft on November 5, 1999.<sup>56</sup> Although the European Commission has now approved the draft Directive, it must be unanimously ratified by EU justice ministers after consultation with the European Parliament, a process which could be concluded by May, 2000.<sup>57</sup>

By contrast, in a recently reported U.S. decision, the existence of a forum selection clause on a website pre-determined the proper jurisdiction for a negligence claim related to personal injury. The plaintiffs in *Decker v. Circus Circus Hotel*<sup>58</sup> filed suit against a hotel which maintained a website through which users could make reservations.<sup>59</sup> The site included a forum selection clause requiring any customer making a reservation over the Internet to agree in advance to have all disputes settled in Nevada state and federal courts.<sup>60</sup> Despite the high level of interactivity involved in the site and

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55. See generally Rome Convention of 1980. The Convention grants contracting parties freedom of choice regarding the law applicable to a contract, and in the absence of a forum selection, it stipulates that:

[T]he contract shall be governed by the law of the country with which it is most closely connected. . . . It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence.

*Electronic Commerce: Legal Jurisdiction and Applicable Law* at 3, in Details of Questions to be Addressed, Secretariat-General of the European Commission (Oct. 8, 1999) <europa.eu.int/comm/sg/tfjai/events/index\_en.htm>.

56. See generally *Electronic Commerce: Jurisdiction and Applicable Law*, The Task Force "Justice and Home Affairs," Public Hearing on Nov. 4-5, 1999 in Brussels, <europa.eu.int/comm/sg/tfjai/events/index\_en.htm>. Member associations of the European Consumer Organization ("EurCo"), among other European Internet industry leaders, were vocal at the November public hearing. EurCo, although favoring the Commission's Draft Directive, stressed that decisions on jurisdiction and applicable law for e-commerce should be tabled until economic impact and cross-policy analyses have been undertaken. See also Fiachra O'Marcaigh, *Computimes: Pitfalls in the e-shop—E-Commerce:Una Tighe on EU Attempts to Level the Legal Playing Field*, IRISH TIMES 12, Nov. 8, 1999, available in 1999 WL 24430170. This strong public consensus for analysis as to how the Draft might be a disincentive to e-commerce businesses was also reflected in the pre-hearing submissions. These submissions can be viewed in their original form at the DG-XV website of the European Union: <europa.eu.int/comm/scic/conferences/991104/contributions.doc>.

57. See O'Marcaigh, *supra* note 56.

58. 49 F. Supp. 2d 743 (D.N.J. 1999).

59. See *id.* at 747.

60. See *id.* at 748.

the court's ruling that the defendant had placed its services into an "endless stream of commerce," the court held that the forum selection clause be enforced.<sup>61</sup> If this U.S. decision is to be considered a portent of developing Internet "contract" law, and many scholars believe that it is, site administrators may be well served by having customers affirm that they have read and understand a forum selection clause by "clicking" on a link before being allowed to engage in an e-commerce transaction.

Until more jurisdictions follow the U.S. and begin to clarify the legal liability of Internet users — including ISPs and publishers — e-commerce businesses will remain keenly interested in which forums might assert jurisdiction over them for potential offenses. Some Internet-based businesses may choose to remove operations from forums where laws are not conducive to the services they provide, as Psinet did in reaction to the lower court decision in *CompuServe*. Depending on the technical capabilities of the service provider, the decision could be made simply to block the availability of the service from the forum. What makes the proposed EU Directive particularly troubling is that if passed, the second alternative — blocking the content — becomes perhaps the only viable and safe option for a company concerned about foreign litigation. However, the most proactive of short-term solutions will be for companies to obtain legal advice to determine what Internet services can be provided from a given country or simply made available in the forum. Until foreign states adopt more uniform methodologies for determining jurisdiction, such analyses must continue to be done on a forum-by-forum basis.

#### **B. "Unlimited" Access to Information means "Big" Liability for Content**

Apart from novel ways in which an Internet business itself can operate, a myriad of unique twists on traditional legal issues have arisen that also must be considered in determining whether your business model is right for you. Although you may have the tenacity and expertise to manage your chosen Internet venture, do you have the fortitude to bear potential liabilities? Perhaps the most frequently

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61. See *id.*

discussed of these legal concerns is that of liability for website content. Content which is entirely or mostly generated by the site owner typically presents the least complex liability issues, and in this regard, site owners in the U.S. enjoy the First Amendment and other significant legal protections, similar to those available to publishers.<sup>62</sup>

Many website owners, however, license content from others rather than develop their own. Licensing agreements between the site owner and the content creator ensure that the site owner has the rights it needs to distribute, alter, republish or otherwise use the licensed content.<sup>63</sup> Yet, as the interactivity of a website increasingly becomes a key draw for retaining Internet customers, more sites are building web communities — including chat, message boards and e-mail with their primary provision for e-commerce transactions. Indeed, many of the most prominent Internet businesses, including America Online, began by offering the e-mail and message board functions of a traditional ISP before engaging in e-commerce. As a result, much of the content in these “extra” areas, the traditional ISP functions, is created by users of the site and cannot, as a practical matter, be reviewed or edited by the site owner.

In addition, the now common practice of linking to or “framing” the content of other sites can subject site owners to either vicarious liability for knowingly linking to another site that engages in infringing activity, or direct liability for infringing on the trademark of the linked site.<sup>64</sup> In 1997, Ticketmaster sued Microsoft for using hypertext links to bypass Ticketmaster’s homepage and advertising, claiming that Microsoft was engaging in an unlawful use of Ticketmaster’s site content.<sup>65</sup> Similarly in 1997, several news media joined a suit with the Washington Post alleging that TotalNEWS engaged in trademark infringement by framing the Post’s website news content with TotalNEWS

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62. See Nicole A. Wong and James F. Breilsford, *Conducting Web Site Legal Audits: A U.S. Perspective*, Perkins Coie LLP (1999) <<http://www.perkinscoie.com/webrelease/webaudits.htm>>.

63. See *id.*

64. See *id.*

65. See *Ticketmaster Corp. v. Microsoft Corp.*, CA No. 97-3055 DDP (C.D. Cal., April 28, 1997).

advertisements.<sup>66</sup> Both suits were ultimately settled.

With regard to defamation, the U.S. Congress included Section 230 in its enactment of the Communications Decency Act of 1996, which largely immunizes ISPs from liability arising from the statements of third parties.<sup>67</sup> Subsequent legal decisions have held that under Section 230, a website owner cannot be held responsible for the defamatory or otherwise tortious statements of individuals who post on its message boards.<sup>68</sup>

Congress also recently enacted a law that limits copyright liability for ISPs — and thus substantially alters case law holding each ISP liable for copyright infringements committed by the ISP's users. Title II of the Digital Millennium Copyright Act ("DMCA")<sup>69</sup> categorizes each separate function of an ISP and provides that each function cannot create monetary liability for copyright infringement.<sup>70</sup> For example, an ISP would incur little or no liability for its transmitting/routing and caching functions, third-party postings, or use of its information retrieval tools.<sup>71</sup>

The Act does not change existing U.S. definitions and requirements for copyright infringement, but rather decreases the stakes for providers of a technology not contemplated when America's copyright law was enacted.<sup>72</sup> Generally speaking, these liability limitations apply only to passive activities, where the ISP does not exercise any control over, or interact with, the content of the infringing material. However, under the DMCA, websites must register with the Copyright Office and put in place a policy for reporting possible copyright infringement on their site if such is detected.

Recent legal decisions have also held that certain methods of conducting Internet business can be patented.<sup>73</sup>

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66. See *The Washington Post Co., et al., v. Total News, Inc.*, 97 Civ. 1190 (PKL) (S.D.N.Y., Feb. 28, 1997).

67. See 47 U.S.C. § 230. Some provisions of the Act, relating to "obscene" material, were struck down as unconstitutional. See *generally* *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997).

68. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

69. 17 U.S.C. § 512 (1998).

70. See *id.* § 512(a)-(d).

71. See *id.*

72. See *id.* § 512 (j).

73. See, e.g., *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

In the past year, at least ten specific Internet-based patents have been issued, covering online processes such as reverse-price auctions, "shopping carts," secure online payments, online incentives, pay-per-view advertisements, personal privacy and "push" technology. Jay Walker, founder of Walker Digital — which develops new tech-driven business models, patents them and spins them off into businesses — has particularly benefited from these rulings.<sup>74</sup> Walker Digital's first successful concept company, Priceline, enables customers to name their own price for airline flights, using the Internet to connect the user with an airline willing to "make the deal."<sup>75</sup>

Yet apart from copyright issues, patents and other readily anticipated content concerns, the Internet can serve as a stage for content liability that might never be expected. For instance, consider eBay's decisive action in late August, 1999 to stop a user from auctioning off a "fully functional" human kidney, but not before the "item" had brought in more than \$5.7 million in bids.<sup>76</sup> Noting that trafficking in human organs is a federal felony, punishable by a minimum of five years in prison and fines of \$50,000 or more, eBay's vice president of marketing swiftly affirmed that "eBay has a zero tolerance for illegal items on the site,"<sup>77</sup> despite its hands-off approach as a platform for consumer sales.

### C. Identifying the Customer and the Right to Privacy

Given the information that the business and customer must exchange to facilitate a given e-commerce transaction, privacy rights remain a hot-button issue. One frequently-debated aspect of Internet consumer privacy rights stems from businesses use of information they glean from their customers. Most e-businesses have recognized that it is imperative not to request social security numbers as a means of identifying potential customers. Most Internet users are savvy enough to recognize that their credit identity can too

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74. See Levy, *Wired for the Bottom Line*, *supra* note 18.

75. *Id.*

76. See *Online Shoppers Bid Millions for Human Kidney*, *CNN Interactive*, Sept. 3, 1999, <<http://www.cnn.com/TECH/computing/9909/03/ebay.kidney>>.

77. *Id.*

easily be stolen with such information.<sup>78</sup> However, both businesses and consumers should be aware of how Internet browsing and purchasing habits can be *passively* tracked. With each website a consumer visits, “cookies” — small pockets of programmed information are placed onto the user’s computer. This information can then be tracked and further developed by those Internet companies seeking to analyze and benefit from the consumer’s online behavior. Although it generally takes minimal effort to “clear” cookies deposited on a PC, a computer user must first know where and when to look. The information gleaned from “cookie content” — a map of your online behavior — can enable Web businesses to engage in sophisticated discrimination by refusing to notify you (as a user) of lucrative discounts because your online habits indicate that you are not a “big spender.”<sup>79</sup> On the intrusive side of the scale, websites can also use “cookie content” to deliver targeted advertisements to you as you browse the Web.<sup>80</sup>

Typically, once a business identifies its customer through either first-time registration or a previously used username and password, it will voluntarily address consumer fears at the outset of a transaction by affirmatively asking whether the business can sell the customer’s transaction information to another business. In addition, through proper registration and identification, most businesses ensure that the user is not simply *posing* as its customer. However, consumers should note that not all states require Internet businesses to offer this courtesy. Although the federal government has moved slowly to regulate the Internet, many individual states including New Jersey, Washington, New York and Connecticut have adopted online privacy protections.<sup>81</sup> In addition, those states that have adopted privacy statutes have been fairly aggressive in enforcing them. For instance,

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78. See Jared Sandberg, *Losing Your Good Name Online*, NEWSWEEK, Sept. 20, 1999, for an indication of just how easily one’s credit identity can be “stolen.”

79. See Edward C. Baig, et al., *Privacy: The Internet Wants Your Personal Info. What’s in it for You?*, BUS. WK., Apr. 5, 1999, at 84-85.

80. See *id.*

81. For a comprehensive overview of state privacy laws, see I.B.A.A., *Financial Privacy in America, a Review of Consumer Financial Services Issues—Appendix I, State Laws/Statutes* (June, 1998) <<http://ibaa.org/privwptext.html#appendix2>>.



on June 30, 1999, U.S. Bancorp agreed to the costly settlement of a suit brought by the State of Minnesota for Bancorp's practice of sharing customer account information, for purposes of marketing non-financial products, without customer consent.<sup>82</sup> In contrast to state efforts, federal legislation has been primarily targeted at protecting the privacy of children and financial and medical information.

Apart from simply complying with any state privacy laws that may apply, most Internet businesses are now using "privacy statements" to inform customers of the sites' intentions regarding any information gleaned from the customer. Typically, websites with privacy statements will inform the user of the policy via a link at the bottom of the main page of the site. These privacy policy statements can be either brief or lengthy, but most often they contain provisions outlining: 1) "information we may collect," 2) use of "cookies," 3) use of links to other websites, 4) consumer opt-out capability and 5) how to contact the site administrator.<sup>83</sup> Many e-business have even contracted with TRUSTe, a not-for-profit firm that specializes in scrutinizing site policies for compliance with applicable law and prevailing consumer concerns about privacy. TRUSTe certifies compliant sites for a fee, and the e-business is then allowed to display the TRUSTe mark on the site. In addition, TRUSTe also offers novice Internet entrepreneurs the opportunity to create a free draft privacy statement by entering certain information at the TRUSTe website.<sup>84</sup>

However, even when your successful e-business has a privacy policy, be extremely wary of surprising consumers with drastic changes in the way the company intends to use information. For instance, the legal and publishing community was nearly unanimous in its anger over Amazon.com's August, 1999 decision to give consumers

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82. See U.S. Bancorp Press Release, *Minnesota Attorney General and U.S. Bancorp Settle Customer Privacy Suit* (June 30, 1999) <<http://199.230.26.69/cgi-bin/micro...1999/0000973575&Edate=Jun+30,+1999>>. As part of the disclosed settlement, U.S. Bancorp must pay \$1.5 million to Habitat for Humanity in Minnesota, \$500,000 to the State of Minnesota, and \$1 million to charities or public bodies in other states in which the bank does business. See *id.*

83. See e.g., *Privacy Statement for GoTo.com*, <<http://www.goto.com/d/about/company/privacypolicy.jhtml>>.

84. See *TRUSTe Privacy Statement Wizard*, <<http://www.truste.org/wizard>>.

access to purchasing data organized by corporate or organizational affiliation. Touting the new feature as a "fun" way to encourage community-building, Amazon published such information as the top selling book among National Semiconductor employees — "101 Nights of Grrreat Sex" and the most popular CD among employees at the Federal Deposit Insurance Corp. — "Zoot Suit Riot: Swingin' Hits of the Cherry Poppin' Daddies."<sup>85</sup> Privacy experts and constitutional scholars were swift in their criticism of Amazon's endeavor, noting that something which "highlights your collection of customer profiles . . . throws fuel on the fire," alienating consumers who are already fearful of how their personal privacy can be invaded by the Internet.<sup>86</sup> Amazon.com has since given consumers the ability to opt-out of such lists, but the emergence of the issue has left many consumers unnerved.

Businesses should also be particularly aware of the European Union ("EU") Data Directive, which became effective in October, 1998. The Directive is currently in effect in the 15 member-states of the EU and applies to every company that collects data about European citizens. The Directive requires companies to ensure that data is: 1) collected only for specific purposes, 2) accurate and current, and 3) discarded once no longer needed. In addition, the Directive prohibits the flow of collected data to non-EU countries that do not provide "adequate" privacy protections.<sup>87</sup> Under the EU Data Directive, European customers have the right to: access collected data, correct the data, object to its use, oppose automated decisions, and seek judicial remedies.<sup>88</sup> Currently, the U.S. and EU are negotiating a set of privacy principles to which U.S. companies could voluntarily adhere as a "safe harbor" under the Directive.<sup>89</sup>

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85. David Streitfeld, *Who's Reading What? Using Powerful 'Data Mining' Technology, Amazon.com Stirs an Internet Controversy*, WASH. POST, Aug. 27, 1999, at A1.

86. *Id.*

87. See Ulrich Wuermeling, *EU's Privacy Directive Endangers World Commerce*, *IP Worldwide* (Jan./Feb., 1999) <[http://www.ipww.com/jan99/p03\\_eu.html](http://www.ipww.com/jan99/p03_eu.html)>.

88. See *id.*

89. See *id.*

#### D. Electronic Contracting

The anonymity, speed and geographic reach of the Internet also present significant challenges to traditional contract principles such as: formation of a contract, permissible terms, evidence of the contract and enforcement. New customers seeking to utilize your system for e-commerce, as well as repeat customers, will rely on registration agreements and contracts "executed" with you prior to their use of your site, both for their protection and yours. These "online contracts" or registration statements can be as simple as having customers key in several choices indicating that they have read the rules prior to using your system, or they can be as complex as formal agreements executed through use of a "digital signature." Regardless of the complexity of the agreement you have with your customers, key features of your digital transactions system should be: confidentiality and verification of user identity, proof of transaction/repudiation, and retention of a positive record of the transaction.

After years of debate and aborted efforts on the issue, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") convened in late July, 1999 to discuss two draft uniform laws to apply to e-commerce transactions. The first, the Uniform Computer Information Transactions Act ("UCITA"), reflects the Conference's desire to ensure that consumers can both thoroughly review an e-commerce transaction before agreeing to it, and rely on procedures for the consumer to manifest assent to the transaction.<sup>90</sup> Among the other concepts addressed by the UCITA are: limitations on consumer liability for "unauthorized" transactions,<sup>91</sup> institution of policies for product return,<sup>92</sup> rules for warranty disclaimers<sup>93</sup> and limitations placed on a business's choice of law and forum.<sup>94</sup>

The second of the draft uniform laws is the Uniform Electronic Transactions Act ("UETA"), which would recognize

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90. See generally *Uniform Computer Information Transactions Act, Conference Draft*, National Conference of Commissioners on Uniform State Laws, Denver, Colorado, July 23-30, 1999.

91. See *id.*, Part 8, at 290-335.

92. See *id.*, Part 6, at 266-88.

93. See *id.*, Part 4, at 169-200.

94. See *id.*, § 109, at 79.

the legal enforceability of contracts in electronic form with an electronic signature.<sup>95</sup> Apart from simply stating that an electronic record may satisfy the requirement of a legally binding writing, the UETA would also require businesses to institute built-in safeguards to prevent the sending of an erroneous transaction record to consumers — *e.g.*, use of a confirmation screen or return confirmation before execution of an order.<sup>96</sup> Although both uniform acts were debated at length during the July, 1999 meeting of the NCCUSL, no votes were taken.<sup>97</sup> However, a final decision on these pending uniform laws is expected soon, and an Internet business owner should keep abreast of any developments.

### E. Regulatory Oversight of the Internet?

The Federal Communications Commission ("FCC") has, up until now, taken a hands-off approach to calls for regulatory oversight of the Internet, particularly with regard to ISP access to methods of high-speed distribution.<sup>98</sup> America Online Inc., the largest U.S. ISP, has been a particularly vocal proponent of FCC intervention to force cable companies to give rivals "open access" to their cable lines for high-speed delivery.<sup>99</sup> Although the FCC's *laissez-faire* approach is largely seen as pro-competitive, proponents of FCC involvement in access to high-speed lines claim that widespread litigation could result from a patchwork of local regulation without centralized guidance.<sup>100</sup> By contrast, the Federal Trade Commission ("FTC") engages in periodic review of Internet content under the aegis of the agency's antitrust enforcement and consumer protection jurisdiction, including scrutiny of any deceptive and misleading advertising.<sup>101</sup> The FTC's

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95. See McBride, Baker & Coles, *Summary of Electronic Commerce and Digital Signature Legislation*, National Conference of Commissioners on Uniform State Law, *Uniform Electronic Transactions Act*, Draft of June 1, 1999, <<http://www.mbc.com/legis/nccusl.html>>.

96. See *id.*

97. See American Law Institute, *Actions Taken at 1999 Annual NCCUSL Meeting*, <[http://www.ali.org/ali/1999\\_Actions\\_Sum.htm](http://www.ali.org/ali/1999_Actions_Sum.htm)>.

98. See, *e.g.*, *Amicus Curiae Brief of the FCC*, in *AT&T Corp. v. City of Portland*, CA No. 99-35609, at 2 (9th Cir., Aug. 16, 1999).

99. See Bloomberg News, *High-tech Group Backs FCC Approach to Net*, WASH. TIMES, Aug. 16, 1999, at D7.

100. See *id.*

101. See Donna De Marco, *Lawyer's Record on Ad Compliance Put to Use on Internet Challenges*, WASH. TIMES, Aug. 16, 1999, at D4.

Internet Task Force engages in "Internet surf days," where Task Force members review the advertising claims made by certain sites.<sup>102</sup> Frequently, the FTC staff will e-mail a site administrator, notifying the site of a violation and giving the site 30 days to comply with requested changes.<sup>103</sup>

## VI Conclusion

Given the Internet's reach and low-cost flexibility, the business modeling options are nearly endless even for the intrepid new entrepreneur. However, with endless new options and business variations come unique legal and technical issues, which cannot be addressed without thorough planning. Once the initial decision has been made to pursue a line of business via the Internet, whether you are an established business in search of new markets or an entrepreneur, you must ask yourself, "Can I handle the responsibility that comes with success?" Although no article can exhaustively cover all aspects of Internet business development, the following basic steps are worthy of re-emphasis:

- Begin your business modeling with a product, service or concept you know.
- Ask yourself, what is it that my customers *really* want, and how else can I deliver it to them?
- Utilizing Internet-unique efficiencies, employ methods of sales/distribution that are suitable both for your product or service and for your chosen customers.
- Develop an appropriate community-building strategy to encourage customer retention.
- Create website content that can be updated efficiently and that is portable, clear, understandable, and attractive.
- Identify your customers, preserve their privacy, and *inform* them of how you intend to preserve their privacy through a policy statement.
- Know the privacy laws of your home jurisdiction.
- Give customers the ability to confirm the validity of

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102. *See id.*

103. *See id.*

orders before they are finally executed.

- Keep continuously aware of evolving risks as the Internet economy and legal landscape develops.

In an uncertain e-commerce legal landscape, as with any new business, an effective business modeling endeavor should contain an element of risk management. As the above discussions indicate, even the most well-thought-out business model with substantiated profit projections can get mired in technical difficulties and legal action if the developer does not remain cautiously aware of the risks. Remember, a primary objective of risk management is to “marginalize” the potential plaintiff’s success. And, in the world of e-commerce, awareness of the risks associated with your business model is not only the first step toward securing your *own* success, but also serves to secure the future of the emerging virtual economy.

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